

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 12, 2004

FLORA MAE MELTON v. GLEN HOUSTON MELTON

**Extraordinary Appeal from the Chancery Court for Lewis County
No. 3767 J. Russ Heldman, Judge**

No. M2003-01420-COA-R10-CV - Filed January 13, 2004

This is the second appeal in this matter. The only issue presented is whether the trial court exceeded its authority on remand by requiring a hearing to determine whether a disputed mediation settlement agreement, entered into by the parties prior to the trial and which the trial court previously held to be unenforceable, should be enforced. Husband did not raise as an issue on the first appeal the trial court's denial of his motion to enforce the mediation agreement. On the first appeal, this court vacated the property division and remanded the case for the classification of the marital estate and for an equitable division of that property determined to be marital property. Further, since alimony cannot be determined until the marital estate is properly classified and the marital property is divided, this court also vacated the order granting alimony and remanded the matter for determination of alimony following the classification of the marital estate and the division of the marital property. On remand, the trial judge set the case for a full evidentiary hearing to determine whether a disputed mediation settlement agreement, previously ruled on and declared unenforceable by the trial judge, should now be enforced. Holding that appellate courts have the power to limit matters on remand, we reverse the trial court and vacate its order to determine if a disputed mediation settlement agreement is enforceable. The matter is again remanded to the trial court for the limited purposes set forth in the prior opinion: to classify the marital assets into separate property and marital property, to make an equitable distribution of the marital property, and to determine the issues of alimony.

**Tenn. R. App. P. 10 Appeal by Permission; Judgment of the Chancery Court
Reversed and Remanded**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, P.J., M.S., and WILLIAM B. CAIN, J., joined.

Ricky Leon Wood, Parsons, Tennessee, for the appellant, Flora Mae Melton.

Landis Turner, Hohenwald, Tennessee, and Randy Hillhouse, Lawrenceburg, Tennessee, for the appellee, Glen Houston Melton.

OPINION

The issue presented is whether the trial court exceeded its authority following a remand by requiring a second hearing to determine whether a disputed mediation settlement agreement entered into by the parties prior to the trial should be enforced.¹

This matter arises out of a divorce and a prior appeal. The trial of this matter was held on August 21, 2000; however, prior to the trial, the parties participated in a mediation settlement conference. A handwritten agreement was entered into following the mediation conference which was signed by Wife and her attorney, Husband and his attorney, and the mediator, J. Wallace Harvill. Further, a Final Report of Mediator was prepared by the mediator and submitted to the trial court. The report indicated that both parties appeared and participated in the mediation and the case had been settled by mediation. Prior to the trial, Husband filed a motion to enforce the mediation agreement. Following a hearing on Husband's motion, the trial court denied the motion and the matter was set for trial.

The trial was held after which the trial judge issued a Final Decree awarding Wife a divorce, granting Wife alimony, attorney fees, discretionary costs, and an award of \$25,000 for personal injuries arising out of an assault on Wife by Husband. Wife had also requested punitive damages as a result of the assault; however, the trial court denied wife's claim for punitive damages.

Husband filed an appeal (the first appeal) raising two issues: (1) whether the trial court failed to equitably divide the marital assets; and (2) whether the trial court erred in awarding Wife alimony *in futuro*, attorney's fees in the form of alimony *in solido*, discretionary costs, and an award for personal injuries. Husband did not appeal the adverse ruling wherein his motion to enforce the mediation agreement was denied.

Husband's appeal was heard and ruled upon by this court on February 22, 2002. *See Melton v. Melton*, No. M2001-00128-COA-R3-CV, 2002 WL 256801 (Tenn. Ct. App. Feb. 22, 2002). This court held that the general principles regarding classification and division of property in a divorce case require classification of the property as either separate or marital property and that with the exception of two assets the trial judge had failed to make a determination of the classification of the property. Accordingly, this court vacated the property division and remanded the case for the classification of the marital estate and for an equitable division of that property determined to be marital property. Further, this court held that a decision with respect to alimony could not be made until the marital estate was properly classified and the marital property divided. Accordingly, this court found that since the trial court had failed to make a classification of the property as marital property or separate property, it must also vacate the order of the trial court granting alimony and

¹The mediation agreement was not an issue in the first appeal and this court did not address mediation in its limited instructions to the trial court on remand.

remanded the matter to the trial court for determination of the aforementioned issues following the classification of the marital estate and the division of the marital property.²

Following remand, the trial judge set the case for hearing, which was held on March 28, 2003. The trial judge took the matter under advisement and thereafter rendered a ruling requiring a full evidentiary hearing to determine whether the mediation settlement agreement previously ruled on and denied by the trial judge should now be enforced.

Wife filed a Tenn. R. App. P. 10 Application for Extraordinary Appeal which this court granted. The only issue presented is whether the trial judge exceeded its authority on remand by requiring a new hearing to determine whether the proposed mediation settlement agreement entered into by the parties should be enforced.

Wife presents several arguments to support her appeal. She contends that Husband waived the mediation issue by not presenting it for review in the first appeal, asserting such to be required by Tenn. R. App. P. 13(b) and 27(a)(4). Wife further argues that the remand was specific concerning the instructions to the trial court, “to determine the separate and marital property of the parties and make equitable distribution of marital property.” Moreover, Wife argues that the doctrines of law of the case, collateral estoppel and *res judicata* preclude Husband from raising the issue now.

Husband raised the issue of enforcement of the mediation agreement at the trial level. The trial court ruled adverse to Husband, denying his motion to enforce the agreement; however, Husband did not present that as an issue in the first appeal. Wife argues that Husband’s failure to address an issue in a brief or argument is treated by the courts as a waiver, citing *Bank of Crockett v. Cullipher*, 752 S.W.2d 84 (Tenn. Ct. App. 1988) and *State v. Bowden*, 656 S.W.2d 58 (Tenn. Cr. App. 1983).

Husband argues that the law of the case doctrine does not apply because the issue was not raised on the first appeal, citing *General Construction Contractors Association, Inc. v. Greater St. Thomas Baptist Church*, 107 S.W.3d 513 (Tenn. Ct. App. 2002). Husband further argues that the doctrine of the law of the case is a discretionary rule and that there are limited circumstances which justify reconsideration of an issue that was decided previously, citing *Memphis Publishing Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303 (Tenn. 1998).

We find that the issue can be resolved without addressing the law of the case, collateral estoppel or *res judicata* doctrines, holding that waiver and the limitations imposed on the trial court upon remand control the issue presented.

²Wife raised one issue on appeal, that being whether the trial court erred in failing to award her punitive damages resulting from Husband’s assault. This court affirmed the trial judge on that issue. Moreover, this court affirmed the trial court on its award of compensatory damages against Husband. Further, these issues are not germane to the issue presented in this appeal.

Husband did not raise as an issue on the first appeal the trial court's denial of his motion to enforce the mediation agreement. Our courts have repeatedly held that one waives an issue if they do not raise it as an issue on appeal. *See Bing v. Baptist Memorial Hospital-Union City*, 937 S.W.2d 922, 924 (Tenn. Ct. App. 1996), *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 86 (Tenn. Ct. App.1988); *Schoen v. J.C. Bradford & Co.*, 642 S.W.2d 420 (Tenn. Ct. App. 1982) and *Independence One Mortgage Corporation v. State Auto Insurance Co.*, No. 02A01-9511-CH-00255, 1996 WL 266651, *1 (Tenn. Ct. App. May 21, 1996). In *Bing* this court stated that it was constrained to note that the plaintiffs had not raised as an issue on appeal the action of the Circuit Court of Obion County in granting the defendant's motion for summary judgment based on the running of the one-year statute of limitations and the three-year statute of repose for medical malpractice actions. Accordingly, the appellate court treated the issue as having been waived. *See Bing v. Baptist Memorial Hospital-Union City*, 937 S.W.2d 922, 924 (Tenn. Ct. App. 1996), citing Tenn. R. App. P. 13(b) and *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 86 (Tenn. Ct. App.1988). In another matter, this court reasoned that although the plaintiff appealed from the trial court's order dismissing both defendants, plaintiff raised no issue in its brief concerning another defendant (Brooks), nor did it contend in any way that the award of summary judgment in favor of Brooks should be reversed. "In light of these deficiencies, we treat the appeal as to Brooks to have been abandoned and any claim for relief waived." *Independence One Mortgage Corporation v. State Auto Insurance Co.*, No. 02A01-9511-CH-00255, 1996 WL 266651, *1 (Tenn. Ct. App. May 21, 1996), citing Tenn. R. App. P. 13(b), and *Bank of Crockett v. Cullipher*, 752 S.W.2d 84, 86 (Tenn. Ct. App. 1988).

Based on the foregoing, we find that Husband waived his right to seek appellate review concerning the mediation settlement agreement by not raising it on the first appeal.

Next we consider the scope of the instructions on remand in the opinion issued by this court in the first appeal. In that opinion, this court made the following ruling concerning the first issue presented by Husband in this appeal:

For the foregoing reason, we vacate the property division of the Trial Court and *remand for the classification of the entire marital estate and for an equitable division of that property determined to be marital property.* (emphasis added)

As for the second issue presented by Husband in this appeal, this court previously ruled:

A decision with respect to alimony cannot be made until the marital estate is properly [sic] classified and the marital property is divided. For the foregoing reason, we vacate the order of the Trial Court granting alimony *in futuro*, alimony *in solido*, and *remand to the Trial Court for a determination of the aforementioned issues* following the classification of the marital estate and the division of the marital property. (emphasis added)

The instructions to the trial court on remand concerning the first issue are: classify the entire marital estate and make an equitable division of that property determined to be marital property. The instructions to the trial court on remand concerning the second issue are: after classifying the entire marital estate and making an equitable division of that property determined to be marital property as aforementioned, determine the issues of alimony *in futuro* and attorney fees (alimony *in solido*).

Our supreme court first recognized the power of a reviewing court to limit orders of remand in *Perkins v. Brown*, 132 Tenn. 294, 177 S.W. 1158 (1915). *Hutchison v. State*, 118 S.W.3d 720, 734 (Tenn. Crim. App. 2003). In *Hutchison*, the court affirmed the judgment in favor of the plaintiff, but remanded the matter to the trial court for a re-determination of damages. In doing so, it determined that judicial economy strongly supported adoption of a rule allowing reviewing courts to issue limited remand orders.

A statement of the rule in succinct terms is to be found in 2 R.C.L. 287, § 241:

"Probably from a desire to eliminate unnecessary litigation, and in the exercise of the discretion with which the appellate court is invested with respect to the granting of new trials, it is undoubtedly the present general rule, in remanding a cause for a new trial, either by a court or a jury, when error exists as to only one or more issues, and the judgment in other respects is free from error, to limit the new trial to the issues affected by the error. This rule permitting the appellate court to limit the issues has been held applicable in actions sounding in damages when the error affects only the assessment of damages, and the new trial has been limited to that question alone."

* * *

If it is to the interest of the state that there be an end to litigation, the courts should not be slow to adopt this rule that looks to the preventing of further contest on phases of litigation or issues already well settled, the saving to litigants the costs incident to the relitigation of such matters, and to the courts the time unnecessarily consumed therein.

As has been noted above, the power is one to be exercised by the court of review in its sound discretion.

Hutchison, 118 S.W.3d at 734-5; citing *Perkins*, 177 S.W. at 1160.

"Neither a trial court nor an intermediate court has the authority to expand the directive or purpose of this . . . remand [which] . . . clearly limited the issue . . ." *Hutchison v. State*, 118 S.W.3d 720, 735 (Tenn. Crim. App. 2003), citing *Weston v. State*, 60 S.W.3d 57, 59 (Tenn. 2001) (issue being whether the petitioner was denied a first-tier appeal of his original post-conviction petition as a result of inaction on the part of appointed counsel.)

[I]n *Cook v. McCullough*, 735 S.W.2d 464 (Tenn. Ct. App. 1987), our court of appeals recognized the power of the appellate courts to limit the scope of a remand. Similarly, in *State v. Irick*, 906 S.W.2d 440, 443 (Tenn.1995), our supreme court, noting that the trial court properly refused to exceed the scope of the high court's remand, ruled that " 'inferior courts must abide the orders, decrees and precedents of higher courts.... [Otherwise] [t]here would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions' " (quoting *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn.1976)).

Hutchison, 118 S.W.3d at 735.

"Neither the trial court, nor appellate court, has authority to expand the limitation placed by the Supreme Court upon a remand." *Cook v. McCullough*, 735 S.W.2d 464, 470 (Tenn. Ct. App. 1987). *See also Inman v. Inman*, 840 S.W.2d 927, 929 (Tenn. Ct. App. 1992).

It is to the interest of all that there be a constraint on unnecessary litigation. Moreover, by remanding a case with limiting instructions when error exists as to only certain issues, the courts maintain the integrity of rulings previously made. Affording the trial court the latitude of implementing the disputed mediation settlement agreement would present a likely conflict between such agreement and the prior rulings of the trial court and this court. Several issues presented at trial and in the first appeal are now final and are not subject to modification. Opening the door for the application of the disputed mediation settlement agreement would only raise more issues, particularly the conflict between prior rulings in this matter that are now final with conflicting provisions in the disputed mediation settlement agreement. It is for these and other meritorious reasons that appellate courts have the power to remand cases with limiting instructions to the trial courts.

For the reasons set forth above, we reverse the trial court's decision to conduct an evidentiary hearing to determine if the mediation agreement is enforceable finding such to be outside the limitations imposed on the trial court by the previous remand. Additionally, we again remand the matter to the trial court for (1) the classification of the entire marital estate and for an equitable division of that property determined to be marital property, and (2) after classifying the entire marital estate and after making an equitable division of that property determined to be marital property, determination of the issues of alimony *in futuro* and alimony *in solido*.

Costs of this appeal are assessed against Husband.

FRANK G. CLEMENT, JR., JUDGE